

Statement of Final Agency Action

18 VAC 65-20-10 et seq.

Regulations of the Board of Funeral Directors and Embalmers

On November 16, 1999, the Board of Funeral Directors and Embalmers adopted final regulations for the establishment of a registration program for crematories. The Board adopted one amendment to the proposed regulation.

SUMMARY OF COMMENTS ON PROPOSED REGULATIONS

Regulations of the Board of Funeral Directors and Embalmers 18 VAC 65-20-10 et seq.

Regulations for the Registration of Crematories

Proposed regulations were published in the Virginia Register of Regulations on August 16, 1999. Public comment was requested for a 60-day period ending October 15, 1999. A Public Hearing before the Board was held on September 15, 1999. The following public comments were received:

2 persons commented about the lack of an "emergency" to justify the emergency regulations that are being replaced.

Explanation: The Code of Virginia provides in § 9-6.14:4.1 C 5 two circumstances in which an agency has an "emergency situation." One of those is that a regulation must be effective within 280 days or less from the enactment of a law; if that requirement is imposed on a board, it must promulgate an emergency regulation in order to be in compliance. When the emergency regulation (which became effective on February 2, 1999) was published, it was noted that the legislation mandating the registration of crematories under the Board of Funeral Directors and Embalmers had a requirement for the regulations to be effective within 280 days and thus the emergency situation described in the Code existed.

There were comments from **10 persons or groups**, all of whom opposed the requirement in proposed regulations that a crematory marketing, selling or dealing directly with the public be licensed as a funeral service establishment. The reasons for the opposition included the following:

- The requirement will raise the costs of cremations and of traditional funerals, since costs are now contained by the option of direct cremation. Consumers would have to pay fees to funeral establishments as well as to crematories, which is unfair to people on limited incomes. Consumers are forced to pay for services that are unnecessary and wasteful such as embalming, coffins, and burial of the cremains.

Board response: There is no evidence that consumers would have to pay for unnecessary services. In fact, licensed funeral establishments are required to provide detailed price lists and disclosures about costs, and consumers have the right to refuse certain services or goods unless required by law.

- The proposed regulation is anti-competitive and a conflict of interests for funeral directors who sit on the Board. It is an attempt to monopolize funeral options so families will have to pay more.

Board response: Same response as above. That is an opinion of the commenter.

- It is an attempt to put independent transportation services out of business and require that only funeral homes be hired to pick up and dispose of remains. If the regulation is adopted, the Board will tell crematories not to accept remains from "independent" removal services.

Board response: Same response as above. That is an opinion of the commenter.

- Pre-need contracts sold to consumers by removal services or crematories may not be honored. Proposed regulations would allow crematories to refuse cremains, which would nullify the contracts.

Board response: Pre-need contracts may only be legally sold by licensed funeral establishments and should not be marketed by removal services or crematories unless they also hold such a license.

- Regulations will force the sale of independent crematories to funeral homes so they will be under the control of the Board.

Board response: The proposed regulations are adopted to provide the consuming public the same protections regardless of the method of disposition chosen. They are not intended to force a sale of an independent crematory.

- Municipalities and other entities would not be able to arrange directly for cremation on a cadaver.

Board response: Municipalities, hospitals and other entities currently contract with many licensed funeral establishments to arrange for direct cremation. Those services would not be affected by these proposed regulations.

- A crematory should not have to comply with all requirements of an establishment, including a preparation room.

Board response: A crematory that deals directly with the public should have a room in which the remains are stored and prepared for cremation. If the crematory is only performing services under contract to a funeral service establishment, those functions are performed by the establishment prior to delivery to the crematory.

- It is inappropriate to involve a funeral service licensee in the operation of a crematory since it is not part of their curriculum or licensure examination.

Board response: Funeral service licensees are educated about federal and state laws regarding cremation. Also, resident trainees must learn about all phases of the funeral business during their apprenticeship.

At the public hearing, the one person made the following comments:

- Proposed regulations contain no standard of practice or authority for the Board to take disciplinary action against a registered crematory. There should be reasonable safeguards to protect the public from such acts as commingling cremains or improper handling of a human body.

Board response:

The Board concurs in the need for some standard by which it could take disciplinary action against a crematory registration and has added an amendment to the final regulations adopted.

Summary of Final Regulations

BOARD OF FUNERAL DIRECTORS AND EMBALMERS 18 VAC 65-20-10 et seq.

Amendments to regulations are adopted pursuant to changes in the Code of Virginia made in Chapter 867 of the 1998 Acts of the Assembly which required the Board to promulgate regulations for the registration of crematories. In accordance with the fourth enactment clause, the Board promulgated emergency regulations which became effective on February 2, 1999. These final regulations replace the emergency regulations and are intended to establish a renewal fee and registration schedule for crematories. The regulations also specify that a crematory providing services directly to the public must be licensed as a funeral service establishment or a branch of an establishment in order to ensure public safety and protection.

Change to Proposed Regulations

In response to public comment, the Board adopted one change to the proposed regulations.

Concern was expressed about the lack of any provision for disciplinary action to be taken against the registration of a crematory found in violation of law and regulation, so the Board has added an amendment to 18 VAC 65-20-435.

REGISTRAR'S SUBMISSION PACKAGE

BOARD OF FUNERAL DIRECTORS AND EMBALMERS 18 VAC 65-20-10 et seq.

Analysis of Final Amendments to Regulation

1. Basis of Regulation:

Title 54.1, Chapter 24 and Chapter 28 of the Code of Virginia provide the basis for these regulations.

Chapter 24 establishes the general powers and duties of health regulatory boards including the power to establish qualifications for licensure and responsibility to promulgate regulations.

§ 54.1-2800 establishes the definitions necessary for the regulation of crematory services, and §§ 54.1-2818.1 through 54.1-2818.3 establish the prerequisites for cremation and the authority for the board to register crematories.

2. Statement of Purpose:

The purpose is to amend regulations pursuant to changes in the Code of Virginia made in Chapter 867 of the 1998 Acts of the Assembly which required the Board to promulgate regulations for the registration of crematories. In accordance with the fourth enactment clause, the Board promulgated emergency regulations which became effective on February 2, 1999. These final amended regulations replace the emergency regulations and are intended to establish a renewal fee and registration schedule for crematories. The regulations also specify that a crematory providing services directly to the public must be licensed as a funeral service establishment or a branch of an establishment in order to ensure public safety and protection.

3. Substance of Regulations:

18 VAC 65-20-70. Initial fees.

The fee for registration of a crematory is established at \$100; the renewal of a crematory registration is established at \$100, payable by January 31st of each year.

The reinstatement fee for a crematory that has allowed its registration to lapse is \$50 for up to 3 years following expiration.

18 VAC 65-20-120 Expiration dates.

The expiration date is established as January 31st of each calendar year.

18 VAC 65-20-130. Renewal of license; registration.

The crematory is added to the listing of persons or entities that must renew according to provisions of this section.

18 VAC 65-20-435. Registration of crematories.

This section establishes the requirement for a person intending to own or operate a crematory to register with the Board at least 30 days prior to opening. It also specifies that an entity providing cremation services directly to the public must be licensed as a funeral service establishment or be a branch of such establishment. This references the current requirement for licensing of funeral establishments.

An amendment to the proposed regulations was added to specify that the Board may take disciplinary action against a registrant found in violation of § 54.1-2818.1 or for the inappropriate handling of dead human bodies or cremains.

4. Issues of the Regulations

ISSUE 1: Establishment of a fee and schedule for renewal of crematory registration.

The third enactment clause of HB 1078 provided that any crematory's valid and current registration with the Division of Vital Records of the Board of Health was automatically transferred to the Board of Funeral Directors and Embalmers, which was authorized to promulgate emergency regulations for the implementation of the act. In its consideration of a fee for initial registration or renewal for a crematory, it was determined that fees should be equal to those currently charged to another entity registered by the Board – a courtesy care holder. The two entities are similar in that they provide limited rather than full services in the funeral industry and therefore, pay registration or renewal fees of \$100 versus the \$225 charged to a funeral service establishment. The reinstatement fee of \$50 per year is the same for any license or registration that has expired.

Advantage or disadvantages

For a crematory seeking initial registration or renewal of registration, the \$100 per year fee should not present a barrier to doing business. Other licensees or registrants of the Board pay hire fees ranging from \$150 for an individual's license to practice funeral services to \$250 for a surface transportation and removal service registration.

There are no advantages or disadvantages to the public; the registration fee should not have any affect on the availability of cremation services to people in Virginia.

ISSUE 2: Establishment of requirements for registration.

The statutory mandate for registration of crematories does authorize the Board of Funeral Directors and Embalmers to establish criteria for or to require inspections of the facilities. There are certain prerequisites for cremations set forth in the Code of Virginia and there are federal regulations which must be followed (such as OSHA rules), but the Board cannot place conditions on the registration of a crematory such as it would on the licensure of a funeral service establishment. Therefore, the only requirement stipulated is that someone intending to open a crematory must apply for registration at least 30 days in advance of opening.

With the advice of the Assistant Attorney General, the Board has interpreted the practice of cremation in which the crematory deals directly with the public as the "practice of funeral services" as defined in § 54.1-2800 of the Code of Virginia. In the proposed regulation, the Board has so specified that a crematory providing services directly to the public must also be licensed as a funeral service establishment or a branch of an establishment.

Advantages and disadvantages

Since the majority of cremation services are performed under contract with a licensed funeral service establishment, the public is protected by the extensive laws and regulations governing disclosures, pricing, sales of pre-need packages, facility standards, and infection control. If a crematory is dealing directly with the public, it is required to hold a license and follow those same laws and regulations. While that may be burdensome to the crematory, it does provide some protection and security to persons who may be vulnerable at the time of a death.

ISSUE 3: Provision for disciplinary action against a registration.

During the public comment period, it was noted that the Board had no provisions for disciplinary action to be taken against a registration. After a thorough review of statutes and regulations by staff and by the Assistant Attorney General who provides counsel to the Board, it was concluded that no such authority currently exists and that the Board would be unable to take any action against the registration of a crematory regardless of the offense or risk of harm to the public.

Under general powers and duties of the health regulatory bodies in § 54.1-2400 of the Code of Virginia, the Board does have the authority to "establish the qualifications for registration," "to promulgate regulations...to administer effectively the regulatory system," and "to take appropriate disciplinary action for violations of applicable law and regulations." Acting under that authority, the Board has added a provision to the proposed regulation which will allow it to take disciplinary action against a crematory for violation of § 54.1-2818.1 or for the inappropriate handling of dead human bodies or cremains.

Advantages or disadvantages

The public is clearly better protected by an amendment to establish a disciplinary provision which would give the Board the authority to withdraw or deny a registration for a crematory found in violation of law and regulation. Funeral establishments that have a registered crematory can be held to standards currently set forth in law and regulation, and the Board can take action against the funeral establishment license. Without the amendment adopted, crematories that are "free-standing" and provide services under contract with a funeral establishment would have no standards for professional conduct or compliance with law. The establishments that contract with those crematories are better protected by the assurance that bodies are being appropriate handled and cremated.

Advantage or disadvantage to the agency

The advantages of the regulations on the registration of crematories are as follows: a) since registration is required by law, the regulations permit the collection of registration and renewal fees to cover the cost of a regulatory program; b) clarification of the law which requires a crematory that provides services directly to the public to be licensed as a funeral establishment; and c) the Board has some standard by which it may take an action against a crematory registration if complaints are founded.

5. Estimated Fiscal Impact of the Regulations

I. Fiscal Impact Prepared by the Agency:

Number of entities affected by this regulation:

There are 41 entities that have registered with the Board as crematories in Virginia.

Projected cost to the agency:

The agency will incur some costs (less than \$2000) for mailings to the Public Participation Guidelines Mailing List, conducting a public hearing, and sending copies of final

regulations to regulated entities. Every effort will be made to incorporate those into anticipated mailings and board meetings already scheduled.

There may be some on-going costs associated with disciplinary cases related to crematories. Since the date of initial registration, July 1, 1998, there have been two cases opened – both related to registered crematories doing business directly with the public in violation of law and regulation. While there are no regulatory requirements for cremations, the Board would anticipate a minimal number of reported violations of law related to crematory practices. If the caseload continues to be 2 to 3 per year, the anticipated disciplinary cost to the Board would range from \$1000 to \$6000, depending on the level of investigative work required, the stage at which an outcome is determined (no violation, pre-hearing consent order, informal conference, formal hearing, etc.).

Projected costs to the affected entities:

Crematories that provide cremation services under a contract with a funeral establishment have been registered with the Department of Health. That registration has been transferred to the Board of Funeral Directors and Embalmers, which has set the fee for initial registration and renewal of \$100 per year. If a crematory allows that registration to lapse, the facility that wants to reinstate its registration would pay an additional \$50 per year for each year in the registration was lapsed.

Citizen input in development of regulation:

In the development of emergency and proposed regulations, notices were sent to persons on the public participation guidelines mailing list of meetings. Emergency regulations were also sent to all entities that had been registered with the Board of Health as crematories. A Notice of Intended Regulatory Action was sent to persons on the PPG list, but no comment was received on the NOIRA. Public comment was also received at each meeting.

Localities affected:

There are no localities affected by these regulations in the Commonwealth.

II. Fiscal Impact Prepared by the Department of Planning and Budget:

(Attached to proposed regulations)

III. Agency Response:

The agency concurred with the analysis of the Department of Planning and Budget.